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No. (1)

Supreme Court, U.S.
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In the
Supreme Court of the United States

JERRY DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES JURISDICTION FOR DIRECT REVIEW OF A CASE REMAIN WITH THE COURT OF APPEALS WHEN A TIMELY NOTICE OF APPEAL WAS FILED APPEALING THE DENIAL OF A MOTION TO APPEAL OUT OF TIME PURSUANT TO RULE 4(b)(4) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, THUS TOLLING THE TIME FOR FILING A 2255 PETITION?

LIST OF PARTIES

All of the parties to the proceeding are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinions by the Fourth Circuit Court of Appeals [A-1]. and district court [A-4, A-7]. are unpublished opinions. The court of appeals issued its opinion on July 2, 2009.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully seeks review on Certiorari from the decision rendered by the Fourth Circuit on July 2, 2009 denying Petitioner's request for a certificate of appealability.

Pursuant to Supreme Court Rule 10, jurisdiction in the Supreme Court is now appropriate, as the Fourth Circuit is believed to have entered a decision that is in conflict with at least one other United States court of appeals in this important matter and has departed greatly from the accepted and usual course of judicial proceedings.

Pursuant to 28 U.S.C. § 1254(1), which provides in relevant part that "cases in the courts of appeals may be reviewed by the Supreme Court" "by writ of certiorari," this Court has jurisdiction to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel. Hohn v. United States, 524 U.S. 236, 253 (1998).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2255 is reproduced in the Appendix hereto at A-34.

STATEMENT OF THE CASE

A federal prisoner must generally file a motion to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255 within one year of "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255. This motion must be filed in the judicial district in which the petitioner was convicted. Id.

Petitioner was charged in a multi-count indictment charging him with Count 1, Conspiracy to Possess with Intent to Distribute 5 Kilograms or More of Cocaine and 50 Grams or More of Cocaine Base in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(A) and 21 U.S.C. § 846. A seventh superseding indictment was filed on December 13, 2005.

On March 28, 2006 Jerry Davis entered a plea agreement in the United States District Court for the District of South Carolina, Greenville Division. An additional contingency of the plea agreement was that Mr. Davis would waive his right to contest either the conviction or the sentence in any direct appeal or other post-conviction action including any proceeding under 28 U.S.C. § 2255. The waiver did not apply to claims of ineffective assistance of counsel or prosecutorial misconduct.

On April 17, 2007 an addendum to the plea agreement was filed with the district court. The addendum called for an additional term of imprisonment of five (5) years as a result of the allegations of the government that Mr. Davis breached his original plea agreement. The addendum did not comply with Rule 11(c)(1)(c) in that the court did not have a separate hearing on the

addendum and its impact on the original binding plea.

On April 23, 2007 the aforementioned judgment was entered resulting in a term of imprisonment of 478 months, five years more than the original binding plea of 420 months. [A-18]

On May 30, 2007 Petitioner Jerry Davis filed a Notice of Appeal *pro se* with the District Court. [A-31] Mr. Davis prepared and filed a petition showing good cause for an extension of the ten day appeal period pursuant to Federal Rules of Appellate Procedure 4(b)(4). In fact, in Mr. Davis's initial *pro se* motion filed on May 30, 2007 as well as in Mr. Davis's motion for cause warranting extension of a ten day appeal period, he gives the reasons for any late filing. Mr. Davis stated that after sentencing, on May 3, 2007, he was transferred from the Spartanburg County Detention Center to Mecklenburg County, North Carolina and then Lexington County, South Carolina. It was not until May 14, 2007 that he arrived in federal custody. Due to the constant movement of Mr. Davis, his ability to communicate with his attorney was restricted. He also had phone restrictions while in custody. Mr. Davis filed a Notice of Appeal on May 16, 2007, by delivering it to the staff mail service at the federal prison in which he is presently incarcerated, FCI Edgefield in Edgefield, South Carolina. The delivery of this Notice of Appeal was May 16, 2007. However, as a result of typical delays in processing mail through the prison system, and security concerns regarding correspondence in and out of the prison, the document was not released from the prison on that same day. Eventually, the Notice of Appeal was mailed by the prison and received by the court on

May 30, 2007. The judgment in the instant matter was filed on April 23, 2007 [A-18] and a Notice of Appeal was effectively filed by delivering it to the Bureau of Prisons staff for mailing on May 16, 2007, less than 30 days from the date of the judgment. See Houston v. Lack, 487 U.S. 266, 270 (1988).

On July 18, 2007, Petitioner Jerry Davis filed a motion for leave to appeal his case out of time. [A-28] On July 18, 2007, the District Court denied Mr. Davis's motion for leave to appeal out of time. On July 20, 2007, Mr. Davis filed a notice of appeal of the denial of his out of time notice of appeal.

The Court of Appeals had jurisdiction of the case until November 6, 2007 when the Court of Appeals dismissed Mr. Davis's appeal pursuant to Mr. Davis's motion for voluntary dismissal. [A-17] He therefore should have had one year, plus 90 days from November 6, 2007 in which to file the § 2255 petition.

Petitioner filed his § 2255 motion on October 24, 2008. The Government filed its opposition on January 22, 2009 with a Motion to Dismiss. Petitioner replied to the Government's opposition on March 9, 2009. The District Court denied the § 2255 motion on timeliness grounds on March 13, 2009. [A-7, A-16] Petitioner filed a motion for reconsideration and certificate of appealability on March 20, 2009, The District Court denied the motion for reconsideration and declined to address the request for a certificate of appealability on March 23, 2009. [A-4] The United States Court of Appeals for the Fourth Circuit denied the certificate of appealability on July 2, 2009. [A-1, A-3] The case is now before this Honorable Court as a Writ for Certiorari.

REASON FOR GRANTING THE WRIT

On March 13, 2009, the district court decided that the one year time clock for a 28 U.S.C. Section 2255 motion started 10 days after the judgment was entered because a timely notice of appeal was not entered by the defendant. However, an untimely notice of appeal was filed within 40 days as allowed by Rule 4(b)(4)[1] of the Federal Rules of Appellate Procedure (Rule 4(b)(4)) for excusable neglect. Mr. Davis also filed a motion for leave to appeal out of time, which was denied by the District Court. Mr. Davis had a right to appeal the order denying the out of time appeal. Mr. Davis timely filed a notice of appeal of that order, therefore jurisdiction properly lay with the Fourth Circuit, and the § 2255 time clock could not run until the court of appeals disposed of the case after receiving Mr. Davis's appeal of the district court's order denying the motion for leave to file an out of time appeal for excusable neglect.

Mr. Davis should have been afforded a reasonable opportunity to have his ineffective assistance of counsel claims, a Sixth Amendment Constitutional right, heard and decided upon. Instead the district court found that Mr. Davis's § 2255 Motion was untimely despite the fact that it was filed within one year of the Fourth Circuit's dismissal of Mr. Davis's appeal. Although Mr. Davis did not file a timely notice of appeal of his conviction with the district

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[1] "Upon a finding of excusable neglect or good cause, the district court may---before or after the time has expired, with or without motion and notice---extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b). FRAP 4(b)(4).

court, he did file a notice of appeal within 37 days of the judgment, enough time for the district court to grant an extension of time pursuant to Rule 4(b)(4) for excusable neglect. Further, when the district court denied Mr. Davis's request to file an out of time appeal, Mr. Davis timely appealed that order. That appeal was pending in the Fourth Circuit when he moved to voluntarily dismiss the appeal on November 6, 2007 which was granted the same day.

The issue is not the effect of an untimely notice of appeal on the one year statute of limitations for filing a § 2255 motion. Rather the issue is the effect of a timely notice of appeal from the denial of a motion for out-of-time appeal in the district court and the voluntary dismissal of that appeal in the court of appeals. Appellate Rule 4(b)(4) acts as a tolling period for habeas statute of limitation purposes, when such a rule is invoked thus initiating direct appellate review. Jurisdiction was held by the court of appeals until the Rule 4(b)(4) issue was dismissed.

A. Dismissal of § 2255 Motion

The district court did not rely on any Fourth Circuit precedent in dismissing Mr. Davis's § 2255 motion. Rather, the district court cited district court cases outside of the Fourth Circuit to support its finding that an untimely notice of appeal does not toll the time for filing a § 2255 motion. See United States v. Jackson, 205 F. Supp. 2d 876 (W.D. Tenn. 2002); Staake v. United States, No. 5:07-cv-189-Oc-10GRJ, 2007 WL 2050939 at *2 (M.D. Fla. July 16, 2007). Additionally, the court relied on Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999) and Clay v. United States, 537 U.S. 522, 532 (2003).

However, Kapral and Clay, are not cases dealing with untimely filing of a notice of appeal and its effect on the tolling for a § 2255 motion, but rather these cases deal with the issue of whether after an appeal is denied, the one year time under § 2255(f) begins after the 90 day period for filing a petition for certiorari with the United States Supreme Court. Id. The court did not analyze the issue as it pertains to the facts in Mr. Davis's case because Mr. Davis did file a timely notice of appeal of the district court's denial of his motion for out of time appeal. Rule 4(b)(4) was still in effect when the first request for an out of time appeal was filed, the denial of which was appealable.

B. Appeal of Motion for Out of Time Appeal

Here, Mr. Davis had a valid claim on appeal: that the district court erred in denying his motion for an out of time appeal pursuant to Rule 4(b)(4) as in United States v. Breit, 754 F.2d 526, 528-29 (4th Cir. 1985). In Breit, the defendant filed an untimely notice of appeal, then a motion for extension for excusable neglect, once denied, he filed a timely notice of appeal of the denial. Id. at 528. Mr. Davis did the very same thing, filing a timely notice of appeal of the denial of the motion for out of time appeal for excusable neglect. That order was issued on July 18, 2007, the notice of appeal of the denial of the Rule 4(b)(4) request was filed on July 20, 2007. This issue was pending before the Fourth Circuit when Mr. Davis filed his motion to dismiss his appeal. The Fourth Circuit had jurisdiction of Mr. Davis's case. If Mr. Davis had not filed to dismiss his appeal, he would have filed his brief, the government would have responded, and the Fourth Circuit would have made a decision on the issue(s) presented. In

the event that the Fourth Circuit denied Mr. Davis's appeal finding that the district court did not err in denying the motion for out of time appeal, Mr. Davis would have then brought the instant issue through a § 2255 motion. That motion would not have been due until one year after the court of appeals had denied the direct appeal of Mr. Davis's request for out of time appeal of his case in chief. Therefore it is only reasonable that once the court divested itself of jurisdiction by dismissing the case, as would have been the case had the court denied the appeal, Mr. Davis had one year from that date to file his § 2255 motion.

Habeas counsel was retained in this case while the appeal was pending and already filed in the court of appeals. In recognition of the issues being more appropriately litigated through a § 2255 motion, Mr. Davis and counsel decided to forego the appeal. Because the court of appeals had jurisdiction of the case when it was dismissed on November 6, 2007, the proper starting date was when the Fourth Circuit divested itself of jurisdiction on November 6, 2007. It cannot be said that Mr. Davis's conviction was final for purposes of § 2255 where his case was still before the Fourth Circuit on the issue of the authorized filing of an out of time appeal from the conviction. "[I]t is well-settled that '[a] motion under [section 2255] is not proper while an appeal from the conviction is pending since disposition of the appeal may make the motion unnecessary.'" United States v. Naqvi, 911 F.2d 725 table (4th Cir. 1990) (citing 3 Wright, § 597 at 483; United States v. Wilson, 894 F.2d 1245 (11th Cir.), cert. denied, 110 S. Ct. 3284 (1990); United States v. Gordon, 634 F.2d 638 (1st Cir. 1980); United States v. Davis, 604 F.2d 474 (7th

Cir. 1979). Clearly Mr. Davis's conviction was still subject to direct review on appeal until his Rule 4(b)(4) issue was resolved.

A conviction is final for purposes of § 2255 "on the date when the petitioner could no longer seek direct review." Hosey v. United States, 518 F. Supp. 2d 732 (D.S.C. 2007) (quoting United States v. Walker, 165 F.3d 22, 1998 WL 722575 at *1 (4th Cir.1998) (unpublished table decision). Petitioner Davis could, and did seek direct review of the District Court's denial of his motion to file out of time appeal. The date he could no longer seek direct review was the date of the Rule 42 dismissal.

Rule 4(b)(4) creates a period extending courts' ability to review the case on direct review which tolls the time for habeas review until the court of appeals decides the issue. This is similar to the 90 day period for certiorari to the Supreme Court. See Clay v. United States, 537 U.S. 522, 532 (2003). The rule protects the direct review process, so when the rule is invoked, it begins the appellate process, thus tolling the time to file a § 2255 petition.

This Court has never ruled on this rule and its application to circumstances such as presented in this case, therefore the review is appropriate in this the matter to avoid confusion and conflict in the future.

C. Voluntary Dismissal

The effect of voluntary dismissal on the timing of a § 2255 petition is a unique question that warrants this Court's attention. In the case of a voluntary dismissal of appeal, the date for filing a § 2255 motion should begin to run on the date the Court of

Appeals dismisses the case. "At the point of the voluntary dismissal of the appeal, therefore, the judgment of conviction would be 'final' in the sense that no avenue of direct review (as of right or by discretion) would remain." United States v. Sylvester, 2006 WL 695796 (M.D. Pa. 2006); *cf.* United States v. Shunk, 113 F.3d 31, 35 (5th Cir. 1997) ("The Shunks' convictions became final in 1992, when they withdrew their direct appeal..."). The Ninth Circuit deems that the conviction is final on the date that the voluntary dismissal is granted. White v. Klitzkie, 281 F.3d 920, 923 (9th Cir. 2002).

Other courts have held that the timing starts 90 days after the voluntary dismissal date, the window allowed for a petition for certiorari to the United States Supreme Court. See Latham v. United States, 527 F.3d 651, 653 (7th Cir. 2008) (holding that petitioner who voluntarily dismisses his appeal can still petition for certiorari and thus conviction is final ninety days after voluntary dismissal), and United States v. Gentry, 432 F.3d 600, 604 n. 2 (5th Cir. 2005) (conviction became final ninety (90) days after appellate court dismissed direct appeal, or, in other words, upon expiration of the time period for filing for a writ of certiorari), and Vroman v. Brigano, 346 F.3d 598, 601 (6th Cir. 2003) (in § 2254 action, the conviction became final ninety (90) days after the Ohio Supreme Court dismissed petitioner's direct appeal), and Chapman v. McNeil, No. 3:08cv5/LAC/EMT, 2006 WL 2225659 (N.D. Fla. May 28, 2008) (in § 2254, conviction was final 90 days after petitioner voluntarily dismissed direct appeal).

The Fourth Circuit seems to follow this latter approach of allowing a year plus 90 days after the date of the dismissal where the petitioner did not petition for writ of certiorari in the United States Supreme Court. See United States v. Sosa, 364 F.3d 507 (4th Cir. 2004). Mr. Davis filed a motion to dismiss his appeal on November 6, 2007. The motion was granted the same day. Until this motion was granted, the Court of Appeals maintained jurisdiction over the case. Following either of the two main approaches to this situation, Mr. Davis had either until November 6, 2008 (1 year from the dismissal) or approximately February 4, 2009 (1 year plus 90 days, petition for certiorari timing) to file his § 2255 motion. Because the § 2255 motion was timely, Mr. Davis respectfully requests that this Honorable Court remand the § 2255 motion for proceedings on the merits of the Constitutional claims.

Certiorari is also warranted in this case because if petitioners are barred from bringing § 2255 petitions due to timing where they have voluntarily dismissed an appeal, they may be encouraged to allow their appeals to languish on, thus clogging the courts with unnecessary appeals in order to preserve time to bring a § 2255 petition.

It is respectfully requested that this Honorable Court grant this writ for certiorari on the issue of whether a conviction is final for timing purposes for filing a § 2255 motion on the day a district court denies a motion to file an untimely notice of appeal or not until the court of appeals disposes of the a timely notice of appeal to review the district court's denial of leave to proceed on an out of time appeal. The district court and court of appeals erred in not

considering the issue properly. Therefore based on the facts and law, Mr. Davis respectfully requests this Court to grant this petition for writ of certiorari.

WHEREFORE, Mr. Davis respectfully requests that this Honorable Court grant this petition for writ of certiorari on these questions of law as the Petitioner has shown that the district court erred in not examining the merits of Petitioner's Constitutional issues and the Fourth Circuit erred in dismissing the case.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 09-6512

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

JERRY DAVIS,
Defendant – Appellant.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry M. Herlong, Jr., Senior District Judge. (6:03-cr-01092-HMH; 6:08-cv-70123-HMH)

Submitted: June 18, 2009

Decided: July 2, 2009

[Entered: July 2, 2009]

Before MICHAEL and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Marcia G. Shein, LAW OFFICE OF MARCIA G. SHEIN, PC, Decatur, Georgia, for Appellant. Robert Frank Daley, Jr., Assistant United States Attorney, Columbia, South Carolina, Leesa Washington, Assistant United States Attorney, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jerry Davis seeks to appeal the district court's order denying relief on his 28 U.S.C.A. § 2255 (West Supp. 2009) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Davis has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-6512
(6:03-cr-01092-HMH)
(6:08-cv-70123-HMH)

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

JERRY DAIVS,
Defendant – Appellant.

Filed: July 2, 2009
[Entered: July 2, 2009]

JUDGMENT

In accordance with the decision of this Court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Conner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

United States of America

vs. **Cr. No. 6:03-1092-HMH**

Jerry Davis,
Movant.

OPINION & ORDER

[Entered: March 23, 2009]

This matter is before the court on Jerry Davis's ("Davis") motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the court's March 13, 2009 order ("March Order") dismissing Davis's motion pursuant to 28 U.S.C. § 2255 as untimely and granting the Government's motion for summary judgment.[1]

A motion to alter or amend the judgment under Rule 59(e) may be made on three grounds: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). "Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to the issuance of the judgment . . . ." Pac. Ins. Co. v. Am. Nat'l Fire Ins.

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[1] In addition, Davis has submitted an application for a certificate of appealability. The court declines to address Davis's arguments in support of a certificate of appealability. The Fourth Circuit will consider these arguments on appeal.

Co., 148 F.3d 396, 403 (4th Cir. 1998). "In general reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." Id. (internal quotation marks omitted).

In his Rule 59(e) motion, Davis argues that his § 2255 motion is not time barred because it was filed within one year of the voluntary dismissal of his appeal. (Davis's Mem. Supp. Mot. Reconsideration 12.)

The Government raised the statute of limitations defense in their response to Davis's § 2255 motion. In reply, Davis did not address the Government's argument that Davis's § 2255 motion is time-barred. For the first time, Davis addresses this argument in his Rule 59(e) motion. As noted above, it is improper to raise for the first time in a Rule 59(e) motion an argument which could have been raised prior to the entry of judgment. Moreover, Davis presents no new facts or evidence that alter the court's original findings in the March Order. In addition, Davis identifies no clear error of law.

Further, attorney error does not excuse the untimely filing of Davis's § 2255 motion. Rouse, 339 F.3d at 257 (holding in a death penalty case that counsel's error in filing a habeas petition one day late did not constitute an "exceptional circumstance" that warranted equitable tolling); Merritt v. Blaine, 326 F.3d 157, 169 (3d Cir. 2003) (applying general rule that "attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling" (internal quotation marks omitted)); Beery v. Ault, 312 F.3d 948, 951 (8th Cir. 2002) ("Ineffective assistance of counsel generally

does not warrant equitable tolling."); Fierro v. Cockrell, 294 F.3d 674, 683 (5th Cir. 2002) ("[C]ounsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file [the] habeas petition in the district court within the one-year limitations period."). Even if Davis's counsel believed that the one year statute of limitations did not begin to run until after Davis voluntarily dismissed his appeal on November 6, 2007, counsel still had six months to file the § 2255 motion. Based on the foregoing, Davis's motion is denied.

Therefore, it is

ORDERED that Davis's motion to alter or amend judgment, docket number 890, is denied.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
United States District Judge
Greenville, South Carolina
March 23, 2009

NOTICE OF RIGHT TO APPEAL

The Movant is hereby notified that he has the right to appeal this order within sixty (60) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

United States of America,

vs. **Cr. No. 6:03-1092-HMH**

Jerry Davis,
Movant.

OPINION & ORDER

[Entered: March 13, 2009]

This matter is before the court on Jerry Davis's ("Davis") motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (2006). After a thorough review, the court dismisses the instant § 2255 motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 28, 2006, Davis pled guilty pursuant to a plea agreement to one count of possession with intent to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base and one count of money laundering. The plea agreement was a Rule 11(c)(1) plea to a specific term of imprisonment of 420 months. The plea agreement required Davis to cooperate with respect to disclosure of his assets including submitting to a polygraph examination. Further, if Davis breached the plea agreement, the plea agreement would be rendered null and void and Davis would be sentenced without the benefit of the

negotiated 420-month sentence. Moreover, Davis waived the right to appeal his conviction and sentence.

After Davis's guilty plea, the Government alleged that Davis breached his plea agreement because he failed his polygraph and engaged in certain illegal conduct after pleading guilty. The parties resolved the Government's claim without the court's intervention by entering into a post-plea amendment to the plea agreement, which increased his sentence of imprisonment from 420 months to 478 months.

Davis was sentenced to 478 months' imprisonment on April 17, 2007. Judgment was entered on April 23, 2007. Davis did not timely appeal his conviction and sentence. However, on May 24 and May 29, 2007, Davis filed untimely notices of appeal.[1] On July 18, 2007, Davis filed a motion for leave to file a notice of appeal out of time, which the court denied later that same day. On July 20, 2007, Davis appealed the court's denial of his motion for leave to appeal.

On July 24, 2007, Davis filed a pro se motion asking the court to reconsider its July 18, 2007 order and grant an extension of time to file a notice of appeal for good cause shown,[2] which the court denied on July 27, 2007. Davis voluntarily dismissed his appeal pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure on November 6, 2007.

On October 24, 2008, Davis filed the instant § 2255 motion, in which he alleges several ineffective assistance of counsel claims. (Davis's § 2255,

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1 See Houston v. Lack, 487 U.S. 266 (1988).

2 Id.

generally.) The court ordered the Government to respond to Davis's motion on October 27, 2008. On January 22, 2009, the Government filed its response raising the statute of limitations as an affirmative defense and addressing Davis's claims. Further, the Government filed a motion for summary judgment arguing that Davis's motion is time-barred, and alternatively, Davis's first and third claims conclusively fail on the merits and should be dismissed. In addition, the Government requested that certain sealed filings in the underlying criminal case be unsealed. Davis submitted a reply on March 9, 2009.

II. DISCUSSION OF LAW

The Government argues that Davis's § 2255 motion is time-barred. In his response to the Government's motion, Davis does not address the Government's argument that his motion is time-barred. Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal prisoners seeking habeas relief have one year from the date their conviction becomes final to file a § 2255 motion. Section 2255 provides as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—(1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right

> asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f) (2006). Davis did not file a timely direct appeal of his conviction within ten days of entry of the final judgment. Davis filed untimely notices of appeal on May 24 and May 29, 2007. Further, Davis filed two motions for leave to file an out of time appeal, which the court denied. In addition, Davis voluntarily dismissed his appeal of his conviction and the denial of his motion for leave to file an out of time appeal. The Fourth Circuit issued an order dismissing the case pursuant to Rule 42(b) on November 6, 2007.

Research did not reveal any Fourth Circuit precedent addressing the effect of an untimely appeal on the one-year statute of limitations for filing a § 2255 motion. However, other district courts have addressed this question. In United States v. Jackson, the United States District Court for the Western District of Tennessee held that the movant's untimely notice of appeal "did not toll the running of the limitations period" for filing a § 2255 motion. 205 F. Supp. 2d 876, 880 (W.D. Tenn. 2002). Further, in Staake v. United States, the United States District Court for the Middle District of Florida held in an unpublished opinion that the "[p]etitioner's untimely filed notice of appeal did not alter the finality of her conviction, which became final ten days after the written judgment of

conviction was entered on the criminal docket." 2007 WL 2050939, at *2 (M.D. Fla. 2007) (unpublished); see also, Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999) (holding that "[i]f a defendant does not pursue a timely direct appeal to the court of appeals, his or her conviction and sentence become final, and the statute of limitation begins to run, on the date on which the time for filing such an appeal expired"); cf. Clay v. United States, 537 U.S. 522, 532 (2003) (holding that a defendant's judgment of conviction becomes final when the time for seeking review of the conviction expires).

Similarly, in Johnson v. United States, the Sixth Circuit held that a "delayed Rule 33 motion[ ] [for a new trial] do[es] not affect the finality of judgment for purposes of the AEDPA [and] also furthers the AEDPA's strong preference for swift and final adjudication of § 2255 motions, as expressed through its strict limitation period and constraints on successive petitions." 246 F.3d 655, 659 (6th Cir. 2001) (noting that "the ten-day period for filing a notice of appeal is tolled while a Rule 33 motion not based on new evidence is pending, and begins to run anew after the order disposing of the motion" and "the period for filing a notice of appeal is tolled while a Rule 33 motion based on new evidence is pending, so long as that motion is filed within ten days after the entry of the judgment of conviction"). The court agrees with these cases. As the Eleventh Circuit stated in Jones v. United States, 304 F.3d 1035, 1039 (11th Cir. 2002):

> Since the Court has upheld the signal purpose animating AEDPA as being the desire of Congress to achieve finality in criminal cases, both federal and state, through strict

> interpretation of the one-year limitation period for federal prisoners in § 2255, we must be cautious in analyzing a § 2255 petitioner's appellate issues not to create a loophole which is contrary to the legislative intent of insuring a greater degree of finality.

(Internal quotation marks omitted.) Based on the foregoing, Davis's conviction became final on May 7, 2007, the date his time for filing a direct appeal expired. See Fed. R. App. Proc. 4(b)(1)(A) & 26(a)(1)-(2). Davis had until May 7, 2008, to file the instant § 2255 motion under the AEDPA. The instant § 2255 motion was filed on October 24, 2008. Therefore, Davis's claim is barred by the statute of limitations under § 2255(1).

Further, §§ 2255(2) - (4) do not apply in this case. Specifically, with respect to § 2255(4), Davis's claims concern his counsel's action taken during pretrial proceedings in this matter related to motions and plea negotiations. Davis alleges that his counsel was constitutionally ineffective for failing to (1) challenge venue on the money laundering count, (2) seek a second Rule 11 plea hearing with respect to the post-plea amendments to Davis's plea agreement, and (3) request a hearing regarding Davis's alleged breach of the plea agreement. (Davis's § 2255 Mot., generally.) "Through the exercise of due diligence," Davis could have discovered his alleged claims prior to his sentencing on April 17, 2007. § 2255(f).

In addition, the doctrine of equitable tolling does not save Davis's motion. The court may excuse a late-filed motion under § 2255 through equitable tolling. However, "equitable tolling is available only in those rare instances where–due to circumstances

external to the party's own conduct–it would be unconscionable to enforce the limitation period against the party and gross injustice would result." United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004) (citing Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003)). In other words, an otherwise time-barred defendant must present "(1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time" in order for equitable tolling to cure his late-filed application for relief. Sosa, 364 F.3d at 512 (quoting Rouse, 339 F.3d at 246). There were no extraordinary circumstances beyond Davis's control that prevented him from filing his § 2255 motion on time. Davis is represented by counsel. Rouse, 339 F.3d at 257 (holding in a death penalty case that counsel's error in filing a habeas petition one day late did not constitute an "exceptional circumstance" that warranted equitable tolling); Merritt v. Blaine, 326 F.3d 157, 169 (3d Cir. 2003) (applying general rule that "attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling" (internal quotation marks omitted)); Beery v. Ault, 312 F.3d 948, 951 (8th Cir. 2002) ("Ineffective assistance of counsel generally does not warrant equitable tolling."); Fierro v. Cockrell, 294 F.3d 674, 683 (5th Cir. 2002) ("[C]ounsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file [the] habeas petition in the district court within the one-year limitations period.")

However, even if Davis was not represented by counsel prior to the expiration of the statute of limitations and believed that the statute of

limitations did not begin to run until after he voluntarily dismissed his appeal, Davis's current predicament is created by his lack of attention to the one-year limitations period. Davis voluntarily dismissed his appeal on November 6, 2007. Therefore, Davis still had six months to file his motion. "[E]quity is not intended for those who sleep on their rights." Fisher v. Johnson, 174 F.3d 710 (5th Cir. 1999) (citing Covey v. Arkansas River Co., 865 F.2d 660, 662 (5th Cir.1989); Coleman v. Johnson, 184 F.3d 398, 403 (5th Cir. 1999) (noting that equitable tolling did not save the Petitioner's habeas petition irrespective of whether the court equitably tolled the time from when the Petitioner alleges that he filed his state application for post-conviction relief and the conclusion of the state proceedings because the Petitioner "should have attempted to expediently file his federal habeas petition upon receiving notice that his state petition had been denied" and "[b]ecause Coleman does not explain the six-month delay between being notified about his state application and filing his federal petition"). Davis does not explain why he waited six months after dismissal of his appeal to file his § 2255 motion. There are simply no extraordinary circumstances present in this case that would warrant equitable tolling. Based on the foregoing, Davis's § 2255 motion is time-barred.

Further, the Government moves to unseal certain sealed documents in the court's record. The Defendant does not object to this request. As such, the court will unseal docket entries 652 and 670, including all attachments.

Therefore, it is

ORDERED that the Government's motion for summary judgment, docket entry 876, is granted. It is further

ORDERED that Davis's § 2255 motion, docket entry 859, is dismissed. It is further

ORDERED that docket entries 652 and 670, including all attachments, are hereby unsealed.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
United States District Judge
Greenville, South Carolina
March 13, 2009

NOTICE OF RIGHT TO APPEAL

The movant is hereby notified that he has the right to appeal this order within sixty (60) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

United States of America,

vs.

Jerry Davis,
Movent.

SUMMARY JUDGMENT
IN A CIVIL CASE

Cr No. 6:03cr1092

[Entered: March 13, 2009]

Decision by the Court. This action came before the court for consideration. The issues have been reviewed and a decision rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is hereby entered for the United States of America. Jerry Davis's § 2255 motion is DISMISSED.

March 13, 2009

LARRY W. PROPES, CLERK
UNITED STATES DISTRICT COURT
/s/ Larry W. Propes
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: November 6, 2007
[ENTERED: November 6, 2007]

No. 07-4731
6:03-cr-01092-HMH

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

JERRY DAVIS
Defendant - Appellant

O R D E R

Appellant has filed an motion to dismiss. The Court dismisses this appeal pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure. The Clerk of this Court will issue a certified copy of this order to the Clerk of the District Court as and for the mandate.

For the Court - By Direction
/s/ Patricia S. Connor
CLERK

United States District Court
District of South Carolina

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1987)

UNITED STATES OF AMERICA

vs.

JERRY DAVIS

Case Number: 6:03cr1092-11
US Marshall's Number: 27533-112
Rauch Wise, David Rudolf, Ret
Defendant's Attorney

[Entered April 20, 2007]

THE DEFENDANT:

[X] pleaded guilty to count(s) 1ss and 3ss of the Seventh Superseding Indictment on March 28, 2006.

[ ] pleaded nolo contendere to count(s) after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section - 21:846, 841(a)(1) & (b)(1)(A)
Nature of Offense - Please see indictment
Date Offense Concluded - 12/13/05
Count Number(s) – 1ss

Title & Section – 18:1956(a)(1)(A)(I), (a)(1)(B)(I), 18:1957 & 18:2
Nature of Offense - Please see indictment
Date Offense Concluded - 12/13/05
Count Number(s) – 3ss

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)

[X] Count(s) 1 of the Fifth Superseding indictment and 1s of the Sixth Superseding Indictment are dismissed on the motion of the United States.

[ ] Forfeiture provision is hereby dismissed on motion of the United States Attorney.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court or United States attorney of any material change in the defendant's economic circumstances.

April 17, 2007
Date of Imposition of Judgment

/s/ Henry M. Herlong, Jr
Henry M. Herlong, Jr. United States District Judge
Name and Title of Judicial Officer
April 20, 2007
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of four hundred seventy-eight (478) months. This term shall consist of 478 months as to count 1ss and 240 months as to count 3ss, to be served concurrently.

[X] The court makes the following recommendations to the Bureau of Prisons: The Court recommends that this defendant be housed as close to his family in Georgia as possible.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at a.m./p.m. on.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on_____ to

_____at _____,

with a certified copy of this Judgment.

UNITED STATES MARSHAL

Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years as to count 1ss and 3 years as to court 3ss, to be served concurrently.

1. The defendant shall report to the probation office in the district to which the defendant is release within 72 hours of release from the custody of the Bureau of Prisons.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable)

[X] The defendant shall cooperate in the collection of DNA as directed by the Probation Office. (Check, if applicable)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the Probation Office. (Check, if applicable)

[ ] The defendant shall participate in an approved rehabilitation program for domestic violence. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and

shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant will make all checks and money orders payable to the "Clerk, U.S. District Court" unless otherwise directed by the court.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Assessment - Totals: $ 200.00

[ ] The determination of restitution is deferred until An *Amended Judgment in a Criminal Case* will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed on the next page.

> If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified in the priority order or percentage payment column on the next page. However, pursuant to 18 U.S.C. § 3664(8), all nonfederal victims must be paid in full prior to the United States receiving payment.

[ ] If applicable, restitution amount ordered pursuant to plea agreement. . . . . .$.

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

> [ ] The interest requirement is waived for the D fine and/or D restitution.
>
> [ ] The interest requirement for the D fine and/or [ ] restitution is modified as follows:

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [x] Lump sum special assessment payment of $ 200.00 due beginning immediately.

[ ] not later than, or

[ ] in accordance with [ ]C, [ ]D, or [ ]E below; or

B [ ] Payments to begin immediately (may be combined with [ ]C, [ ]D, or [ ]E below); or

C [ ] Payments in (e.g., equal, weekly, monthly, quarterly) installments of $. over a period of (e.g., months or years), to commence after the date of this judgment; or

D [ ] Payments in (e.g., equal, weekly, monthly, quarterly) installments of$. over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court, unless otherwise directed by the court.

The Defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant names and case numbers (including defendant number), total amount, joint and several amount, and corresponding payee, if applicable.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[X] The defendant shall forfeit the defendant's interest in property as directed in the Preliminary Order of Forfeiture, filed April 17, 2007 and the said order is incorporated herein as part of this judgment:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

CASE NO.: 6:03-1092-11

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JERRY DAVIS,
Defendant.

MOTION FOR LEAVE TO FILE APPEAL OUT OF TIME (F.R.A.P. 4(b)(4)

Appellant respectfully moves for an order of this Court permitting his filing of an appeal out of time, pursuant to Rule 4(b)(4), Federal Rules of Appellate Procedure and in support thereof offers the following:

Appellant was sentenced by this Court on April17, 2007 to a term of imprisonment of 478 months. Judgment was entered on Appellant's sentence on April 23, 2007.

Appellant filed his notices of appeal, pro se, on May 30, 2007 and May 31 2007 and contends therein that he requested his trial attorney to file the notice of appeal following his sentencing on April 17, 2007. However, Appellant was thereafter transferred to FCI, Edgefield, South Carolina, and had no further contact with his trial attorney. He thereafter filed his notices, pro se, "from an abundance of caution."

Whereas, Appellant signed a plea agreement in which he waived his right to appeal, such waiver is not determinative of the question now before the Court. Although the undersigned is not fully aware or informed of the potential grounds for appeal in Appellant's case, the decisions of the Fourth Circuit Court of Appeals have acknowledged that, whereas appeal waivers are enforceable, the Court has "refused to enforce valid appeal waivers for a narrow class of claims", based upon the Court's determination that those claims were not within scope of waiver. United States v. Poindexter, 2007WL10845119 (4th Cir. June 28, 2007). The Fourth Circuit decision in Poindexter further holds that, where an appellant gives his attorney unequivocal instructions to file an appeal, the attorney is obligated to do so.

Appellant contends that he gave his trial attorney instructions to file an appeal. The undersigned has attempted to confer with the trial attorney by telephone about this issue, but as of the date of this filing has been unable to do so and cannot represent to the Court whether or not the assertion made by Appellant is a contested fact issue.

Moreover, at the time of sentencing the trial court failed to inform Appellant of his right to appeal. Rule 32(j)(1)(B) of the Federal Rules of Criminal Procedures provides: "Appealing a Sentence. After sentencing - regardless of the defendant's plea - the court must advise the defendant of any right to appeal the sentence." The United States Supreme Court has held that "trial judges must be meticulous and precise in following each of the requirements of Rule 32 in every case."

Peguero v. United States, 526 U.S. 23, 119 S. Ct. 961 (1999). Admittedly, the facts, here, are confounded somewhat by the existence of a waiver of appeal which appears to be valid, on its face. Nevertheless, in United States v. Poindexter, supra, the Fourth Circuit Court of Appeals observed, in that case involving waiver of appeal, that even an accused who has waived a right to an appeal is entitled to the services of an attorney who will examine the trial record and identify and weigh potential issues for appeal, noting the ethical duty of that attorney to prepare a brief on the merits of any meritorious issue and to argue the appeal accordingly. Perhaps the drafters of Rule 32 did not contemplate the circumstance of a waiver of appeal in a plea agreement, but the language of the rule appears to be mandatory: "The court must advise the defendant of any right to appeal the sentence." (Emphasis added).

Further, in light of Appellant's sentence of 478 months, he requests that this Court liberally construe the provisions of F.R.A.P 4(b)(4) and permit his filing, out of time.

Respectfully submitted,

BARR, UNGER & McINTOSH, LLC
/s/Capers G. Barr, III
CAPERS G. BARR, III
Post Office Box 1037 (29402-1037)
11 Broad Street
Charleston, South Carolina 29401
843-577-5083
843-577-5081 (fax)
Attorney for Appellant

Dated July 18, 2007

FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

JERRY DAVIS,
Appellant,

v. **Case No. 6:03-1092-11-HMH**

UNITED STATES OF AMERICA,
Appellee.

NOTICE OF APPEAL

Comes Now, the Appellant Jerry Davis, pro-se, in the above styled case and submits this his Notice of Appealing the Judgment entered on April 17, 2007. In support of this Motion, Petitioner presents the following:

That being sentenced on April 17, 2007, Appellant notified Counsel of Record Attorney David S. Rudolf that he wised to appeal the Judgment entered by this Court. Subsequently, Appellant was transferred to FCI Edgefield in South Carolina where Appellant arrived on May 16, 2007.

In an abundance of caution, Appellant submits his Notice of Appeal pro-se, since he has not been in contact with Counsel since sentencing.

Wherefore, Appellant respectfully prays that any delay in the filing of said notice be executed if necessary, in the interest of justice.

Done this the 16th day of May 2007.

Respectfully Submitted,
/s/ Jerry Davis
Jerry Davis, Pro-Se

Certificate of Service

I Jerry Davis herein certify that I have served the foregoing upon the Clerk of this Court by placing the same in the U.S. Postal Mailbox on May 16, 2007, with one copy to the AUSA.

Signed pursuant to 28 U.S.C. § 1746.

/s/ Jerry Davis
Jerry Davis, Pro-Se

Eddie Davis #37533-112
Federal Correctional Institution
P.O. Box 725
Edgefield, S.C. 29824

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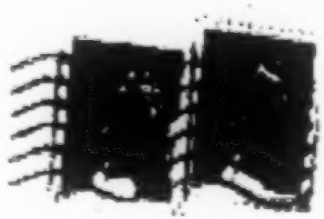

To: U.S. District Court
District of South Carolina (Greenville)
P.O. Box 10768
Greenville, S.C. 29603

29603+0768

28 U.S.C. § 2255 : US Code - Section 2255: Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. An appeal may be taken to the court of appeals from the order entered on the

motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain -

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.